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IN THE

Supreme Court of the United States

REPUBLIC PICTURES CORPORATION, *Appellant,*

vs.

FRANCIS KAPPLER, *Appellee.*

No. 723.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

PETITION FOR REHEARING BY APPELLANT

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REVIEW OF RECORD.

Appellant duly took an appeal to the Supreme Court of the United States from a judgment of the Circuit Court of Appeals, 8th Circuit, which held Chapter 267 Laws of the Fiftieth General Assembly of Iowa to be void on the ground it violated the Federal Constitution. The Iowa statute in question provided as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

After the appeal was taken, appellee filed under Rule 7(3) of this court, what was entitled a "Motion to Dismiss or Affirm". But the Motion to Dismiss or Affirm filed by the appellee was addressed only to the jurisdiction of the court and did not go to the merits of the case. Consequently, the appellant, in filing Resistance to Appellee's Motion, confined itself to the jurisdictional matters raised by appellee in his Motion and answered them seriatim in its Resistance to the Motion. Had the Motion of Appellee gone to the merits, appellant would have made resistance to the grounds urged. But, in affirming, this Court has passed upon the merits of the case without affording appellant its day in court. The order of this court entered on February 4th affirming the Circuit Court of Appeals, 8th Circuit, was as follows:

> "*Per curiam:* The motion to affirm is granted and the judgment is affirmed. *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U. S. 230, 233, 234; *Pufahl v. Estate of Parks*, 299 U. S. 217, 227; *Miles v. Illinois Central Railroad Co.*, 315 U. S. 698, 704."

The foregoing order is obviously based upon the merits of the case and is far broader than the merely jurisdictional grounds stated in the motion of appellee. Appellant has therefore been denied an opportunity to say why it believes this appeal should be heard.

PROPOSITIONS AND AUTHORITIES.

UNDER THE RULES OF THIS COURT, THE APPEAL SHOULD NOT HAVE BEEN DISMISSED ON ITS MERITS.

Authority.

Rule 7(4) of the Revised Rules of Supreme Court of the U. S.

THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE NOT SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT. THEREFORE THIS CAUSE SHOULD BE HEARD ON ITS MERITS.

Authorities.

28 *USCA* Sec. 725.

Canadian Northern Ry. Co. v. Eggen, 1919, 252 U. S. 553.

Campbell v. Haverhill, 1894, 155 U. S. 610.

Chicago & N. W. Ry. Co. v. Ziebarth, 1917, (8th Cir.) 245 Fed. 334.

M'Elmoyle v. Cohen, 1839, 13 Peters 312.

12 *Am. Jur.* p. 121, Sec. 464.

Bauserman v. Blunt, 1893, 147 U. S. 647.

Chattanooga Foundry v. Atlanta, 1906, 203 U. S. 390.

3 *Cyc. of Fed. Proc.* (2d Ed.) Sec. 619, page 115.

Momand v. Twentieth-Century Fox Film Corp., 1941, 37 Fed. Supp. 649.

Following cases distinguished:

McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 233, 234.

Pufahl v. Estate of Parks, 299 U. S. 217, 227.

Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704.

Argument.

This case comes up on appeal (28 U. S. C. A. Sec. 347). But in this court's order of affirmance it has been treated as though here on petition for writ of certiorari. Appellee filed a motion challenging jurisdiction and the court affirmed the case *on its merits*. Appellant has not been heard on the question of whether the appeal should be considered on its merits, notwithstanding a state statute has been held void as violative of the federal constitution. Rule 7(4) of the Revised Rules of Procedure provides the grounds on which a motion to affirm will be received. Following is the pertinent portion of the rule:

> "The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Under the foregoing rule it is clear that a motion to affirm will be received only on the following two grounds: (1) That it is manifest the appeal was taken for delay only, or (2) that it is manifest the questions on which the decision depends are so unsubstantial as not to need further argument.

Please note that appellee's motion was not addressed to either of these two grounds. A careful examination of the Motion reveals that neither of these grounds nor anything touching them was so much as mentioned. Consequently, in filing its resistance to appellee's motion, appellant confined itself to the jurisdictional matters raised by the motion.

Turning to Rule 7(4) again, no one will seriously contend that this appeal has been taken for delay only. The Circuit Court of Appeals was divided on the important constitutional issue involved in the appeal. An array of respectable authority supports the position of appellant and

the dissenting opinion of Sanborn, J. in the Circuit Court.

Referring to the second ground upon which a motion to affirm will be received under the rules, is it manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument?

Involved herein is a question of the constitutionality of a regularly enacted statute of limitations passed by the legislature of a sovereign state. Is a statute, duly enacted by the highest legislative body of a state to be declared violative of the federal constitution by the highest court of the land without affording the party adversely affected an opportunity to present his reasons why the appeal should be heard on its merits?

Will such a statute be held unconstitutional by the highest court of the land in a summary fashion without an adverse contest between the parties and a full opportunity for presentation of the reasons why the appeal should be heard?

Presumptively, being a regularly enacted legislative Act, the statute is constitutional. (*South Carolina State Highway Dept. v. Barnwell Bros.*, 1938, 303 U. S. 177). Constitutionality of a state statute will not be considered in a friendly suit; it must be a bona fide adversary proceeding. (*Chicago, etc., R. Co. v. Wellman*, 1892, 143 U. S. 339). But this appellant has not had an opportunity to present its view of the merits at all. To rule a duly enacted statute of a state unconstitutional upon a motion addressed to jurisdiction only, denies appellant his opportunity to say why the appeal should be heard. Appellant has been denied its day in court. Surely, every litigant should have an opportunity to say why his appeal should be heard, especially where the decision below has denied a right granted by a state statute.

The Iowa statute is unusual in its form, but it embraces a subject matter admittedly within the jurisdiction of the

state legislature. If the Iowa statute is held unconstitutional it must be because of the *form* of the statute. No rule is more firmly entrenched in the federal law than that the Rules of Decision Act applies to state statutes of limitation in the case of enforcement of federally created rights in both the federal and state courts where Congress has failed to provide a limitation. This rule is so deeply rooted, that it applies to federally created rights, enforceable only in the federal courts. The following authorities are in point on the foregoing propositions:

In *Bauserman v. Blunt*, 1893, 147 U. S. 647, this court says:

> "No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court."

In 3 *Cyc. of Fed. Proc.* (2d Ed.) Sec. 619, page 115, it is said:

> "Moreover, a state is in general free to place of limitation upon the time in which a remedy granted by Federal statute may be asserted in a state."

Campbell v. Haverhill, 1894, 155 U. S. 610, is a leading case upon this subject in which it is said:

> "The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States."

Again in *Campbell v. Haverhill*, it is said, (l. c. page 620):

> "Even upon the theory of the plaintiffs in this case, the statutes of limitations of the States would have been

a good defense so long as the jurisdiction was concurrent, but would cease to be so as soon as the jurisdiction of the Federal courts became exclusive. The bare statement of this proposition is sufficient to show its untenableness."

In *Chattanooga Foundry v. Atlanta*, 1906, 203 U. S. 390, it is said:

"Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the states of the United States."

In *Momand v. Twentieth-Century Fox Film Corp.*, 1941, 37 Fed. Supp. 649, the court said:

"It was held in the numerous cases cited, *supra*, that the state was free to place a limitation upon the time in which a remedy granted by Federal statute could be asserted in a state, and that such limitations would not impair the right created by congressional statutes."

Reduced to its most fundamental form the question is therefore, is the Iowa statute of limitations invalid because restricted in terms to cases arising under federal statutes? In other words, is the statute invalid because it does not also embrace within its terms other types of cases arising under local law? Otherwise expressed, does the state lack power to legislate directly, but possess power to legislate indirectly upon a subject which Congress has expressly delegated to local determination without reservation?

The summary judgment of this court disposing of the case on its merits overlooks or rejects the fundamental nature of statutes of limitation. It has always been the rule that statutes of limitation cannot be held void because discriminatory. Discrimination is of their essence. The difficulty arises only when the period of limitation is so short that a litigant is denied free access to the courts for a reasonable period of time within which to bring his action.

In *Canadian Northern Ry. Co. v. Eggen*, 1919, 252 U. S. 553, the question was whether the state of Minnesota could provide one statute of limitations for residents of the state, and a different limitation for non-residents. The Circuit Court of Appeals (8th Cir.) held it could not. The Supreme Court of the United States reversed the Circuit Court of Appeals. The following quotations from the opinion by the unanimous court demonstrates the rationale of the case:

> "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection."

Again in *Canadian Northern Ry. Co. v. Eggen*, the court says:

> "The discrimination of which he complains could arise only from his own neglect."

In *M'Elmoyle v. Cohen*, 1839, 13 Peters 312, this court considered whether a state statute specifically limiting the time for commencement of actions upon a foreign judgment to a time shorter than that prevailing for the institution of actions upon domestic judgments, denied the full faith and credit to which foreign judgments were entitled under Article IV of the Constitution. Therein the court held that the statute in question affected the remedy only and that discriminatory legislation providing different limitations did not affect the case in a constitutional sense. In its opinion, the court says:

> "Such being the faith, credit, and effect, to be given to a judgment of one state in another, by the Constitution and the Act of Congress, the point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that

settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail. *Higgins v. Scott*, 2 Barn. & Adol. 413; 4 Cowen R. 528, note 10; *Id.* 530; *Van Ramsdyk v. Kane*, 1 Gillis R. 371; *LeRoy v. Crowninshield*, 2 Mason R. 351; *British Linen Co. v. Drummond*, 10 Barn. & Cress. 903; *De LaVega v. Feanna*, 1 Barn. & Adol. 284; *De Coche v. Savalier*, 3 Johns. Ch. R. 190; *Lincoln v. Battalle*, 6 Wend. R. 475; *Guilick v. Lodes*, Green's New Jersey Rep. 68; 3 Burge's Com. on Col. and For. Laws, 883. The statute of Georgia is 'that actions of debt on judgments obtained in courts other than the courts of this state, must be brought within five years after the judgment obtained.' It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not, then, limit the time for remedies upon the judgments of other states, and alter the common law by statute, fixing a less or later time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing, in regard to a state's right to legislate in this particu-

> lar, then the judgment creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon the judgment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. * * *"

In 12 *Am. Jur.*, page 121, Section 464, the true rule is stated as follows (apparently taken from the *Eggen* case):

> "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection."

Arbitrary classification of causes of action for limitation purposes is the rule, not the exception. There is no rule that the classification must fit into a symetrical pattern. Nor has any case heretofore held that the legislature may not legislate specifically for the purpose of fixing statutes of limitation on federally created rights *enforceable in the state courts.* The Iowa statute does not attempt to override the supremacy of federal law. It merely fills the gap which Congress by its silence, has left to the states without reservation. If Congress is not satisfied with the limitation provided by the legislatures of the respective states, the remedy should lie with Congress—not with the courts.

There is no invasion of the supreme authority of the federal government because, (1) Congress has abandoned its authority voluntarily to the states by its silence, well-knowing that the matter was being left to local law; and (2) no one is in a position to complain as long as he is permitted to bring his action within a reasonable time. If Congress is not satisfied, it may prescribe its own period of limitations.

The Iowa statute was not designed to provide a statute of limitations for federally created rights enforceable only in the federal courts. The Iowa statute would operate upon such rights enforceable only in the federal courts, not *ex propre vigore*, but by virtue of the Rules of Decision Act (28 U. S. C. A., Section 725; *Campbell v. Haverhill*, 1894, 155 U. S. 610; *Bauserman v. Blunt*, 1893, 147 U. S. 647). If there is to be a reservation engrafted upon the Rules of Decision Act, such reservation should be supplied by Congress, and not by a legislative fiat of the court.

Cases Distinguished.

In its order of February 4th, this court cites three cases in support of its decision. They are:

McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 233, 234.

Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704.

Pufahl v. Estate of Parks, 299 U. S. 217, 227.

The *McKnett* case, *supra*, involved an Alabama statute which completely closed its courts to enforcement of a federally created right arising in Tennessee. The distinction between this situation and the case at bar is so apparent, it seems it should demand little discussion. The complete closing of the courts of a state to a litigant attempting to enforce a federally created right is a far cry

from a statute of limitations allowing free access to the courts of a state for a reasonable length of time. Especially is this true where the subject matter is admittedly within the jurisdiction of the state legislature and the attack is only upon the form of the statute.

The *Miles* case, *supra*, involved an injunction by a Tennessee court which enjoined a litigant from bringing suit in Missouri on a federally created right. The *Miles* case is analogous to the *McKnett* case but bears little, if any relation to the case at bar for the same reasons. It involved the complete closing of a court to enforcement of a federally created right.

In the *Pufahl* case, *supra*, one Elvira Parks, died owning stock in a national bank. Some two years after administration was opened on the estate the Comptroller of Currency declared the bank insolvent and appointed the petitioner receiver thereof. The Comptroller assessed all stockholders, including the executors of the will of Elvira Parks, 100% of the par value of all stock held. The Illinois Probate Court disallowed the claim because a state statute limited the period for filing claims to one year. The federal law provided for the assessment of stockholders of National Banking Associations and the petitioner contended that the federal law authorized the allowance of the claim regardless of the Illinois statute. In the *Pufahl* case the claim of the receiver *was not upheld*, but denied. In the case at bar the Circuit Court of Appeals quoted the following provision from the opinion in the *Pufahl* case:

> "This is not to say that a state may deny all remedy for the substantive right arising out of the Federal statute * * * it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action." (Italics supplied by the C. C. A.)

It will be observed that the foregoing portion of the opinion of the *Pufahl* case was directed to the question of whether a national bank receiver must assert his claim in the same forum in which other claims against a decedent's estate were required to be made under local law, and the quotation did not refer to the applicability of the state statute of limitations. The portion of the opinion in the *Pufahl* case which the Circuit Court of Appeals chose to italicize must be read in the light of the language immediately preceding it, to-wit: "This is not to say that a state may deny all remedy for the substantive right arising out of the Federal statute". The italicized language was directed to a situation in which a state might discriminatorily deny jurisdiction to its courts for the enforcement of federally created rights. The opinion was not intended to, and did not, involve the question of how long state courts must be open for the enforcement of federally created rights. The actual decision in the *Pufahl* case would support the position of the appellant in the case at bar, insofar as the Supremacy clause of the Constitution is concerned. The case is no authority for the contention that a state cannot in the exercise of control over its courts, enact a statute of limitations specifically applicable to federally created causes of action which are enforceable in its own courts. Congress is the body (28 U. S. C. A., Sec. 765) which has declared that such local statute of limitations shall be adopted and applied in the federal courts, (*Bauserman v. Blunt*, 1993, 147 U. S. 647). It is not for the courts to engraft a limitation upon the Rules of Decision Act (*Guaranty Trust Co. v. York*, 1945, 326 U. S. 99).

CONCLUSION.

The matter presented by this appeal is of great importance. Within the last several years at least fourteen other states have passed statutes of limitation specifically directed to federally created rights. They are:

Alabama, Act 392, Acts 1943,
Colorado, S. B. 165, Laws 1945,
Florida, Ch. 21892, Laws 1943,
Georgia, Act 439, Acts 1943,
Maryland, Ch. 518, Laws 1945,
Minnesota, Ch. 513, Laws 1945,
North Carolina, S. B. 316, Laws 1945,
North Dakota, H. B. 114, Laws 1945,
Ohio, S. B. 256, Laws 1943,
Oregon, Ch. 265, Laws 1943,
South Carolina, Act 36, Acts 1945,
South Dakota, Ch. 145, Laws 1945,
Tennessee, Ch. 130, Acts 1945, and
Wisconsin, Sec. 330.215, Statutes 1945.

The memorandum decision of this court without opinion is no guide for consideration of these statutes, and allows the applicable law to remain in a state of great confusion. Appellant respectfully submits that a great injustice has been done in affirming this *appeal* on the merits without allowing it an opportunity to present its reasons why the matter should be heard. Even if the motion filed by appellee had been directed to the merits of the case, such motion should have been overruled under the Rules of this court, because there is a substantial question involved of great importance to many states. The matter should be authoritatively settled only after a full presentation of the many arguments in favor of the validity of the statute in question. The reasons hereinbefore set forth are not as detailed or comprehensive as they might be upon the final presentation of this case, but appellant respectfully submits they are sufficient to amply demonstrate that the ques-

tions on which the decision of the cause depends are not so unsubstantial as not to need further argument (Rule 7(4) of the Revised Rules).

PRAYER.

Wherefore, appellant respectfully prays that a rehearing be granted, that the order of this court on February 4, 1946 affirming the case be set aside, that the motion of the appellee be overruled, and the appeal be permitted to proceed to final determination upon a full consideration of its merits, in accordance with the Rules of this court.

Respectfully submitted,

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